Office-Supreme Court, U.S.
FILED
JAN 15 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-637

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CATHERINE PETERSON,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY MEMORANDUM FOR THE PETITIONER

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January 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On the basis of its earlier decision in *Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), the court below affirmed the Merit Systems Protection Board's ruling that awarding market rate attorney's fees to petitioner in accordance with 5 U.S.C. 7701(g)(1), would violate ethical requirements that prohibit the practice of fee-splitting. The government has failed to offer a persuasive reason this Court should not review the court of appeals' decision, in order to resolve an issue of great importance to public sector unions and other non-profit organizations that provide legal representation to persons vindicating important national statutory policies.[1]

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[1] In opposing petitioner's request for review, the government has not filed a separate response brief, but rather relies in whole upon the arguments made in its brief in opposition to the petition for certiorari in *Goodrich v. Department of the Navy*, No. 84-577 (filed October 10, 1984). All references to the government's brief in this case will therefore refer to the Brief for the Respondent in Opposition filed in *Goodrich*.

1. The government seeks to buttress the court of appeals' ruling by recitation of the familiar principle that counsels deference to agency interpretations of the statutes they are charged with administering. Gov. Br. 6-8. The government posits that "[t]he issue of the award of attorney fees in this case is one peculiarly within the competence of the MSPB to resolve." *Id.* at 6.

The deference principle is inapposite here. In limiting petitioner's fee recovery on the basis of ethical requirements, in accordance with its earlier decision in *Wells v. Schweiker*, 12 M.S.P.B. 329 (1982), the MSPB was not engaged in interpretation of the statute it is charged with administering. Instead, in *Wells*, the MSPB interpreted a judicial decision, *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981), which in turn interpreted the code of professional conduct applicable to the legal profession, a wholly separate body of law. The MSPB has no special expertise in determining ethical questions. Its views were therefore entitled to no special deference. *See, Petrou Fisheries, Inc. v. ICC*, 727 F.2d 542, 545 (5th Cir. 1984); *Charter Limousine, Inc. v. Dade County Board of County Commissioners*, 678 F.2d 586, 588 (5th Cir., Unit B, 1982); *H.W. Wilson Co. v. U.S. Postal Service*, 580 F.2d 33, 37 (2d Cir. 1978).[2]

2. In any event, as we explained in our opening brief (Pet. 9-11), the MSPB's interpretation of ethical require-

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[2] The court of appeals did not suggest any deference was due the MSPB's views when it reviewed the MSPB's holding on the ethical question. *See, Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984).

Moreover, the MSPB's decision in *Wells* is not entitled to any special weight because it failed to take account of the D.C. Circuit's subsequent decision in *Jordan v. United States Department of Justice*, 691 F.2d 514 (1982). In that case, the court indicated that the ethical considerations discussed in *NTEU v. Treasury, supra*, would not preclude an award of market rate fees where a separate litigation account was maintained. *Id.* at 516, n.14. *See*, note 3, *infra.*

ments, (and the court of appeals' affirmance), was simply incorrect. While the government's brief strongly (and inappropriately) urges deference to the MSPB, it wholly fails to offer any sound basis for the legal conclusions the MSPB reached. Instead, the government's brief simply restates the question-begging "analysis" of the MSPB in *Wells v. Schweiker*, *supra*, and the court of appeals in *Goodrich*. *See*, Gov. Br. 11-13. Thus, the government merely recites that the union would "indirectly benefit" from a market rate fee and that this would somehow constitute "fee-splitting." But the government fails to respond to our argument that the widespread and heretofore unquestioned practice of depositing fees into a separate fund used solely to finance litigation does not violate the language of the fee-splitting prohibition, and creates none of the dangers the prohibition is designed to prevent. *See*, Pet. 9-11.[3]

3. The government contends that, in any event, the MSPB is free to limit fee recovery in accordance with this interpretation of ethical requirements. It urges that imposition of the putative ethical requirement was merely

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[3] Nor does the government successfully dispel the conflict between the court of appeals' decision here, and the ruling of the D.C. Circuit in *Jordan v. United States Department of Justice*, *supra*. *See*, Gov. Br. 12-13, n.4. It is true, as the government states, that the *Jordan* decision did not make clear the actual financial relationship between the Institute for Public Representation and the attorneys representing the plaintiff, Jordan. But the court took pains to point out that in order to sanction an award of market rate fees to the Institute, in light of *NTEU v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981), it would have to assume that the Institute maintained a separate fund for litigation. 691 F.2d at 516, n.14. If the *Jordan* court did not decide the separate account would cure any ethical problems, as was first suggested in *NTEU* (656 F.2d at 855), then there would have been no need for it to have mentioned its assumption that such an account existed. Certainly the non-profit legal community could reasonably read the court's language in *NTEU*, and later *Jordan*, as sanctioning the practice of depositing market rate fees in a separate account used solely for litigation.

an exercise of the MSPB's authority to "fill in the gaps" in the statutory scheme of the Civil Service Reform Act. Gov. Br. 8-9.

Congress left no "gap" to be filled by the MSPB concerning the legal standard by which fees were to be awarded. Congress gave the MSPB authority under 5 U.S.C. 7701(g)(1) to determine whether an award was warranted "in the interest of justice." At that point, it directed that the MSPB may issue an award of "reasonable attorney's fees." As we described in our opening brief (Pet. 12-13), this Court explained last term in *Blum v. Stenson*, —— U.S. ——, 104 S. Ct. 1541 (1984), that Congress has uniformly employed this language to denote that prevailing market rates should be awarded, regardless of whether private or salaried in-house counsel represents the prevailing party.[4]

In an attempt to evade the established import of the language Congress employed, and the general rule that market rate fees be awarded, the government has undertaken a search for evidence of Congressional intent to permit departures from the market rate standard in cases involving unlawful personnel actions against federal employees. Unable to find any such evidence in the legislative history of the Civil Service Reform Act, the government relies upon the fact that subsection (g)(2) of 5 U.S.C. 7701 (which governs discrimination cases), specifies that payment of fees under that section will be "in accordance with the standards prescribed under Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-(k)," while subsection (g)(1) (which governs other prohibited personnel practices) does not so provide. Gov. Br. 9.

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[4] In *Blum*, the Court expressly rejected the argument, suggested again by the government here (Gov. Br. 8, 14), that an award of prevailing market rates to salaried in-house counsel would constitute a "windfall" award. 104 S. Ct. at 1547.

However, as petitioner Goodrich explained in his opening brief (at pp. 9-11), the legislative history surrounding the provisions makes it clear that the inference the government proposes is unwarranted, and that the aberrational result it urges is contrary to Congressional intent. That history shows that the only difference Congress intended to create between the two sections is in the standard for deciding whether or not to award fees, not in the method for calculating fees. Thus, under (g)(1), market rate fees may be awarded under the somewhat narrower "interest of justice" standard, while under (g)(2) they are available under the same circumstances as they would be in actions under the civil rights acts. Nothing in the legislative history suggests that Congress did not intend market rate fees to be available under subsection (g)(1).[5]

4. Contrary to the government's suggestion, (Gov. Br. 14), the court of appeals' ruling here is a far-reaching one that threatens the settled expectations and heretofore established rights of the non-profit legal community to market rate fees under a broad range of statutes. *See*, Pet. 6-7. The immediate and important issue is, of course, the availability of market rate fees under 5 U.S.C. 7701(g)(1) to public sector unions vindicating the merit system principles contained in the Civil Service Reform Act. But the effect of the court of appeals'

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[5] In an unpersuasive attempt to distinguish the policies underlying the award of fees in civil rights cases from the policies underlying the award of fees here, the government boldly asserts that an award of market rate fees is not needed to assure that employees can obtain counsel to represent them in MSPB proceedings. Citing *Vaca v. Sipes*, 386 U.S. 171 (1971), it implies that the union has a legal responsibility to provide attorneys to members who appear before the MSPB. Gov. Br. 10, n.3. This is erroneous. The union has no obligation to supply attorneys to employees in such statutory proceedings, which are not established by the collective bargaining agreement. *See, American Federation of Government Employees, Local 2126, AFL-CIO, San Francisco, California*, 1 F.L.R.A. No. 112, 1 F.L.R.A. 992 (1979).

ruling is much broader than that. Indeed, the government does not deny that in light of its reasoning market rate fees will no longer be available under many statutes, including those protecting civil rights.[6]

Under the decision below and under the goverment's analysis (Gov. Br. 14), courts and even administrative tribunals may deny plaintiffs market rate fees by considering "whether Congress, in determining that fees ordinarily should be awarded on the basis of the prevailing market rate, had overridden the ethical concerns that otherwise would weigh against such arrangement."

We are not aware of, nor has the government cited, a single instance in which Congress has even considered these so-called "established ethical constraints" (Gov. Br. 14) in either the statutory language or legislative history of fee-shifting legislation. Therefore, under the decision below, in the guise of discerning legislative intent, courts and administrative tribunals will be required to make policy judgments properly committed to Congress, *see*, Pet. 13-14, and they may disqualify many plaintiffs from receiving market rate fees, on the basis of non-existent ethical restraints. The effect of the court's ruling can only be to revive the uncertainty this Court seemed to resolve only last term in *Blum*, concerning rights to recover market rate fees under statutory fee provisions.[7]

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[6] In fact the government's brief suggests (at p. 14 and n.6), that despite this Court's apparently clear holding last term in *Blum*, the so-called "ethical concerns" might preclude salaried attorneys of non-legal umbrella organizations (such as the ACLU or NAACP), from recovering market-rate fees under the Civil Rights Attorneys Fees Awards Act.

[7] Indeed, the government has already successfully argued that the *Goodrich* reasoning precludes market rate fees under other statutory provisions. In *Sabey v. United States*, No. 84-83C (Ct. Cl. August 9, 1984), a plaintiff in an action under the Fair Labor Standards Act, 29 U.S.C. 216, who was represented by salaried counsel for a public sector union, was denied market rate fees on the basis of the court's holding in *Goodrich*.

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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